DRUGGED DRIVING CONFERENCE

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Effective Use of DRE Instructors and the Studies

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Studies & Other Useful Information

Some HGN Studies Info

["***The Robustness of Horizontal Gaze Nystagmus Test"***, Dr. Marcelline Burns (Southern California Research Institute), September, 2007. NOTE: this study has been removed from the HGN curriculum. It was not peer reviewed and there were problems with its administration. It was not a validation study and the fact that it once was, but is no longer, used in the HGN curriculum does not invalidate HGN or call into question the continued validity of HGN.]

Study: Nystagmus Testing in Intoxicated Individuals: Dr. Karl Citek, et. al, November 2003.

Dr. Citek, who is an ophthalmologist, and recognized expert in the field of HGN, conducted a study testing HGN and VGN at different positions: standing, seated, and supine. He confirmed the validity of the HGN test in the standing posture to discriminate blood alcohol levels of .08 and .10. He also established, with similar accuracies and reliabilities, the use of the HGN test in the seated and supine postures. There was a statistical difference in the observation of HGN based on test posture. The difference happened in the seated position and was attributed to the difficulty of seeing the eyes. If officers have to conduct the HGN in the seated position, it is recommended that they position the subject in such a way that the subject's eyes can be seen easily throughout the test. This may involve asking the subject to turn the body slightly at the waist, in addition to the head turn used in the current study. Such a minor change in posture will not affect the result. They also confirmed that VGN is present only when signs of HGN are present, and that the VGN test can be used to identify high levels of impairment at any test posture.

Study: Sleep Deprivation Does not Mimic Alcohol Intoxication on Field Sobriety Testing: Dr. Karl Citek et. al, October, 2011.

Subjects participated in two test sessions: one after a full night's rest and the other after staying awake for at least 24 hours. Subjects consumed set amounts of alcohol during each session. Law enforcement officers conducted the standardized field sobriety tests. Researchers also measured clinical responses of visual function and vital signs. The presence and number of validated impairment clues increased with increasing blood alcohol concentration but not with sleep deprivation. The study concluded sleep deprivation alone does not affect motor skills in a manner that would lead an officer to conclude that the suspect is intoxicated. Intoxication must also be present.

Additional Useful HGN Information:

- ***Fatigue Nystagmus:*** (End-Point Nystagmus) is caused by holding the eye at maximum **deviation for 30 seconds or longer.** It has **nothing to do** with fatigue causing nystagmus. (See, *Sleep Deprivation Does Not Mimic Alcohol Intoxication on Field Sobriety Testing*, Karl Citek, 2011.)

- **Fatigue:** Has no effect on HGN. This finding was validated by *Sleep Deprivation Does Not Mimic Alcohol Intoxication on Field Sobriety Testing*, Karl Citek, 2011 as well as a 1981 NHTSA study that showed fatigue had no significant effects on the manifestation of HGN. Do not confuse with fatigue nystagmus which is created if the eye is held at maximum deviation for 30 or more seconds.

- **Natural Nystagmus:** A very small number of people exhibit a visible natural nystagmus (less than 2% of the population). The number is so small according to Dr. Burns (who authored many NHTSA studies and who has been in the field for over 30 years) that she states she can count total number of individuals with this condition on her hands. Natural Nystagmus looks noticeably different than HGN. A trained officer will see this. Visible nystagmus is evident only at particular angles of gaze, but not before or beyond that point. During the test for HGN, the officer is looking for not only nystagmus at a particular angle of gaze, but smooth pursuit and end-point nystagmus as well.

- **Caffeine and nicotine** are stimulants. Stimulants do not create or make HGN visible to the naked eye. There is no evidence that smoking causes HGN. In addition to stimulants, none of the following drug types make HGN visible to the naked eye: cannabis, hallucinogens, and narcotic analgesics.

- **The American Optometric Association** has passed two resolutions approving of HGN as a field sobriety test. They have stated "that the American Optometric Association acknowledges the scientific validity and reliability of the HGN test as a field sobriety test when administered by properly trained and certified police officers."

- **NHTSA** - stands for the National Highway Traffic Safety Administration.

- **SCRI** - stands for the Southern California Research Institute

- **HGN Test is not a vision test.** The suspect must merely be able to see well enough to follow the stimulus.

Additional Useful Studies

Curtesy of Tobin Sidles

Summaries of NHTSA Studies – DRE

***John Hopkins*:** In the 1980's LAPD started a fledgling DRE program. NHTSA was asked to evaluate it for reliability. NHTSA, with John Hopkins University, did a study in 1984 and developed a protocol. Given 15 minutes, the officers had to determine if the volunteer was impaired by drugs. The DRE's were 90% accurate. NHTSA Pub. No. DOT HS 806 753 (1985).

173 Case Study: In 1985 NHTSA conducted a field validation Study of the LAPD DRE program. The study is usually called "the 173 case study". 94% of the time a drug other than alcohol was found as verified when the DRE's stated the suspect was impaired by drugs

Arizona DRE Study: 1994 Drug Recognition Expert (DRE) validation study (Eugene Adler AZDPS, M. Burns-Southern California Research Institute) and a final report was sent to the Governor's Office of Highway Safety.

Cannabis: *Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment,* Rebecca L Hartman, et al (July 2016). Results include: Finger to nose with over three misses best indicator. Eyelid tremors better than an 86.1% predictor. Recommended overall: FTN over 3 misses, eyelid tremors, OLS sway, 2 WAT cues. If 2 or more out of these 4, impaired.

Boating/Seated FSTs

***Validation of Sobriety Tests for Marine Environment*, D. Fiorentino, So. Cal R. I (2010)**

The DRE As An Expert In Arizona

One of the more difficult portions of a DRE trial for a prosecutor may be persuading the trial court the DRE officer is an expert witness. This is because many judges have biases against officers being capable of other than "everyday" police work and, therefore, are predisposed to not recognize law enforcement officers as experts.

> **Practice Pointer** – The practice of submitting a witness to the trial court as an expert after proper foundation has been laid and requesting the court to confer expert status on witness before the jury has been frowned upon as an improper comment on the evidence. [*State v. McKinney,* 185 Ariz. 567, 585-86, 917 P.2d 1214 (1996) (superseded by statute on other grounds as stated in *State v. Martinez*, 196 Ariz. 451, 999 P.2d 795 (2000)); *United States v. Johnson*, 488 F.3d 690; 697-98 (Sixth Circuit 2007)]. This will hold true for both the State and the defense.

No Arizona published opinions address the issue of whether the DRE officer can be qualified as an expert. Accordingly, one must look to general law on the subject. These principles will also apply to qualifying your toxicologist/criminalist as an expert.

I. THE EFFECTS OF DRUGS ON A PERSON HAVE BEEN FOUND TO BE THE PROPER SUBJECT OF EXPERT TESTIMONY BECAUSE THE EVIDENCE IS BEYOND THE KNOWLEDGE OF THE AVERAGE JUROR AND WILL ASSIST THE TRIER OF FACT

The first hurdle one must meet in order to allow the officer to testify as an expert is to establish that the evidence will assist the trier of fact. This requirement is set forth in 17A A.R.S. *Rules of Evidence*, Rule 702 which states in part:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (**a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;**

(Emphasis added.)

The prosecutor may be asked to establish that the proffered evidence is beyond the knowledge of the average juror and that expert testimony will assist the trier

of fact in its determination of a fact at issue. *State v. Plew*, 155 Ariz. 44, 745 P.2d 102 (1987). The fact at issue in a DRE case is whether a drug or its metabolite, in addition to being in the defendant's system, caused the impairment noted by the officer. More to the point, it is whether the drug caused the defendant to be impaired to the slightest degree under ARS § 28-1381(A)(1). For the *per se* charge under ARS § 1381(A)(3) it is simply, was a drug or its metabolite listed in ARS. § 13-3401 in the defendant's system when he or she was driving.

Arizona courts have recognized that when the subject of the proffered evidence is one of common understanding, expert testimony is not needed and should not be allowed. *Plew, supra.; State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1995). The effects of a drug on a person, however, have been found to be beyond the common knowledge of the average juror. Accordingly, courts have found drug effects to be the proper subject of expert testimony. *State v. Betancourt*, 131 Ariz. 61, 62, 638 P.2d 728, 729 (App. 1981)(court of appeals did not "believe that the effect of LSD on the human mind is necessarily within the common experience and knowledge of the jury"); *State v. Burns*, 142 Ariz. 531, 691 P.2d 297 (1984)(held that expert testimony explaining the effect of LSD on a defendant would have been of value to the jury and should have been admitted); *Plew, supra*. (Arizona Supreme Court noted that expert testimony on the effects of cocaine impairment would be a relevant, proper subject conforming to a generally accepted scientific theory if presented by a qualified individual).

II. QUALIFIED EXPERT.

The next step is to prove the DRE officer is an expert. Under Rule 702, *supra.,* the witness must be qualified by knowledge, skill, experience, training or education." The standard to be applied is whether the witnesses' knowledge on the subject is more extensive than that of the average person. *State v. Davolt*, 207 Ariz. 191, 84 P.3d 456 (2004); *State v. Bauer*, 146 Ariz. 134, 704 P.2d 264 (App. 1985). This is a very low standard – remind the court of that.

The prosecutor must lay the proper foundation to qualify the officer as an expert. This is accomplished just as it would be for any expert. Simply highlight the officer's training, education, and experience which provides him or her with more knowledge regarding drugs and their effects on the human body than the average person. Be thorough. The article entitled "The DRE as an Expert Witness" provides examples of areas to explore. You may obtain a copy from the TSRP if you feel it would be helpful.

Practice Pointer – Do not ignore the actual language of Rule 702. It specifically recognizes a witness may be qualified as an expert by "knowledge, skill, experience, training, or education". Too often, judges focus only on the education part of the rule and require some sort of college degree. A witness may, however, be qualified by any of the rule's listed criteria. DRE officers have all of them. Point this out to the court.

Do not overlook the knowledge, skill, and especially the **experience** portion of the rule. There is not just one way to qualify our experts and there is not just one method of proving the evidence is reliable. Experience can and should be included in the determinations of whether the testimony is the product of reliable principles and methods. You may want to make the point that DUI/DRE officers have more experience with drug impaired people than pretty much anyone. More than the average doctor, certainly more than whoever the defense calls as their expert. Our rules recognize the value of experience and the court should also.

Arizona Courts have recognized law enforcement officers as experts in numerous published opinions. *See for example*: *Davolt, supra*. (officer qualified to testify as expert on blood spatter analysis. Training in blood splatter analysis merely consisted of: attending classes on crime scene management, one homicide investigation class, and watching two training videos on blood splatter analysis at the department. The court held"[w]hile this training is not extensive, it is significantly more extensive than the average person has received and is sufficient to allow the testimony to be heard by the jury"); *Desmond v. Superior Court*, 161 Ariz. 522, 779 P.2d 1261 (1989) (recognizing a police officer can be an expert witness in a DUI case, to relate blood alcohol content back to the time of driving, if the officer possesses superior knowledge, experience, or expertise); *State v. Carreon*, 151 Ariz. 615, 729 P.2d 969 (App. 1986) (officer permitted to testify as expert regarding whether drugs possessed by defendant were for sale); and *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983) (officer's four years of law enforcement experience along with specialized training in homicide investigation qualified him as an expert to testify about conclusions made from observations of murder scene.)

With the proper foundation, a DRE officer should likewise qualify as an expert.

III. RULES 703 AND 704.

If the DRE officer is qualified as an expert witness, the areas that the officer will be allowed to testify to should be increased.

Evidence Rule 703 “Bases of an Expert’s Opinion Testimony” provides as follows:

> An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

Under this rule, the expert may form an opinion based on hearsay and other inadmissible evidence such as medical reports. See, the comments to the rule.

Finally, Rule 704 “Opinion on an Ultimate Issue” also applies.

> **(a) In General -- Not Automatically Objectionable**. An opinion is not objectionable just because it embraces an ultimate issue.
>
> **(b) Exception.** In a criminal case, an expert witness must not state an opinion about whether the defendant did not did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.

NOTE: DREs are taught to include in their reports their opinion regarding whether the defendant was unsafe to operate a motor vehicle due to his/her impairment by the drug in his/her system. While it used to be the practice in DRE cases to have the DRE officer testify to this after he/she was qualified an expert witness, it appears that due to addition of subsection (b) in 2012 and the comment to the 2012 amendment to Rule 704 indicating the new language is consistent with current Arizona law, we can no longer do this in a criminal case such as a DUI. It is recommended that the prosecutor caution the DRE officer against doing this prior to testimony.

A. A Word About *Fuenning*.

In DUI cases, objections based on *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983) are quite common. It is recommended that prosecutors actually read *Fuenning* as it is often misquoted and has been extended by some

trial courts further than it appears was ever intended. In *Fuenning*, the Arizona Supreme Court stated in *dicta* that in a DUI alcohol case, when the officer is asked if the defendant was driving while intoxicated, this is in reality asking if the defendant was guilty and thus not advisable. *Fuenning*, at 605, 680 P.2d at 136.

1. Opinions recognizing *Fuenning* as *dicta*.

Numerous courts have recognized this language is *dicta* including: *Carreon, supra.* and *State v. Bojorquez*, 145 Ariz. 501, 702 P.2d 1346 (App. 1985). The fact that it is *dicta*, may help when responding to a motion for mistrial based on *Fuenning.*

2. Useful opinions recognizing the limited scope of *Fuenning*.

In *Fuenning* the officer was asked if he was familiar with the symptoms of intoxication and then answered yes. When asked if the defendant displayed them, the officer answered "Yes. The defendant's conduct seemed influenced by alcohol." *Fuenning* itself found this testimony to be proper, yet this type of testimony routinely gets a *Fuenning* objection that is often sustained.

In *State v. Bedoni*, 161 Ariz. 480, 779 P.2d 355 (1989), the Arizona Court of Appeals held that asking an officer whether the defendant's conduct appeared influenced by alcohol during the DUI investigation was appropriate even under *Fuenning*. Accordingly, under *Bedoni* and *Fuenning*, the prosecutor may be able to ask the officer whether the defendant's conduct appeared to be influenced by drugs.

Questions inquiring into whether the observed behavior is consistent with signs and symptoms of impairment should always appropriate. Finally, a DRE case involves impairment by drugs rather than by alcohol. The signs and symptoms of drug influence are not as familiar to the average trier of fact as alcohol impairment. *Plew, supra.; Betancourt, supra.; and*, *Burns, supra.* Accordingly, evidence as to their effects, including impairment, should be more useful to the trier of fact and easier to admit.

Be aware, however, that courts may be resistant to any line of questioning that touches on impairment. It is very common, in a DUI alcohol case, for the defense to request a mistrial based on *Fuenning, supra*. anytime the officer testifies to impairment. Use caution in this area. It is also recommended you have copies of any opinions you may rely on when responding to a *Fuenning* objection, or motion for mistrial, with you in court.

3. Civilian witnesses may be able to testify to intoxication.

It is worth noting *Fuenning* did not overrule the holding in *Esquivel v. Nancarrow*, 104 Ariz. 209, 450 P.2d 399 (1969) which recognized that even lay witnesses may testify to whether a person appears to be intoxicated. Post *Fuenning*, this portion of *Nancarrow* was positively cited by the Arizona Supreme Court in *State ex rel. Hamilton v. City Court* (*Lopresti,* Real Party in Interest), 165 Ariz. 514, 799 P.2d 855 (1990). *See also, Morales v. Bencic,*12 Ariz.App. 40 (App. 1970).

IV. NON-EXPERTS

If the officer is not qualified as an expert, Rule 701 "Opinion Testimony by Lay Witnesses" will govern.

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is
>
> a) rationally based on the witness's perception
> b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.